NO. 47641-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

OLYMPIC STEWARDSHIP FOUNDATION; J. EUGENE FARR; WAYNE and PEGGY KING; ANNE BARTOW; BILL ELDRIDGE; BUD and VAL SCHINDLER; RONALD HOLSMAN; CITIZENS' ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY; CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND; MATS MATS BAY TRUST; JESSE A. STEWART REVOCABLE TRUST; and CRAIG DURGAN and HOOD CANAL SAND & GRAVEL LLC dba THORNDYKE RESOURCE,

Appellant/Petitioners,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE HEARINGS OFFICE, acting through the WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD; STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY; and JEFFERSON COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

JEFFERSON COUNTY'S ANSWER TO AMICUS BRIEF OF PACIFIC LEGAL FOUNDATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

I. INTRODUCTION

Pacific Legal Foundation ("PLF") has filed an amicus brief which makes a broad-based argument in opposition to the Growth Board's approval of Jefferson County's Shoreline Master Program (SMP). The amicus brief is in essence a political statement, affirming PLF's longstanding opposition to environmental and land use regulations. (*See* litigation cited by PLF on pp. 2-3 of its Motion for Leave to File Brief Amicus Curiae).

The Court should note that PLF represented the lead appellant in this case, Olympic Stewardship Foundation, in its earlier challenge to Jefferson County's Critical Areas Ordinance ("CAO"). See, *Olympic Stewardship Foundation v. Western Washington Growth Management Hearings Board*, 166 Wn. App. 172, 274 P.3d 1040 (2012), *rev. denied*, 174 Wn.2d 1007. In that challenge to the CAO, PLF and its client OSF made essentially the same arguments asserted by PLF in its amicus brief herein. Specifically, PLF argued that the science supporting the County's critical areas regulations was flawed and that therefore, the constitutional requirements of "nexus" and "rough proportionality" had been violated. In that appeal, as in this case, PLF sought to rely on the Supreme Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 309 (1994).

In *OSF v. WWGMHB, supra,* the trial court rejected the arguments presented by PLF and upheld the Growth Board's approval of Jefferson County's CAO. The Court of Appeals affirmed. 166 Wn. App. at 198-199. In making its decision, the Court of Appeals noted that an ordinance enacted under the GMA must be presumed valid and would not be overturned unless its approval by the Growth Board was "clearly erroneous." The Court also stressed that it would give substantial weight to the Board's interpretation of statutes it administers. *Id.* at 189.

The same principles apply in this appeal. The Jefferson County SMP is the product of extensive research, analysis and coordination by Jefferson County and the Washington Department of Ecology over a period of years. After enactment, the SMP was carefully analyzed by the Growth Board, in response to the multiple challenges brought by Appellants herein. Following that review, the Board agreed with Jefferson County and Ecology that the SMP was in full compliance with the Shoreline Management Act and the Growth Management Act.

The Supreme Court has held, where two (or more) agencies with jurisdiction agree on a matter of statutory compliance, the courts should be "loathe" to override the judgment of both agencies whose combined expertise merits substantial deference." *Port of Seattle v. Pollution Control Hearings Board,* 151 Wn.2d 568, 600, 90 P.3d 659 (2004).

The issue in this appeal is not whether every citizen and every organization in Jefferson County agrees that strong regulations must be enacted to ensure the ecological integrity of Jefferson County's shorelines. Invariably, some citizens will support such regulations, and others will resist them. But in view of the deference afforded to Jefferson County's planning actions, Ecology's construction of the Shoreline Management Act and the Growth Board's approval, this Court should affirm the legality and constitutionality of the Jefferson County SMP.

II. ARGUMENT

A. The SMP's Application of No Net Loss Does Not Violate the SMA.

Section I of PLF's legal argument sets up a strawman in its characterization of "no net loss," then proceeds to knock it down. PLF argues that the Board "upheld shoreline master program provisions outright prohibiting any new development that may impact to the shoreline environment to any degree, regardless of mitigation." (PLF Brief, p. 10). The argument is misleading at best. PLF cites to JCC 18.25.270(2)(b) which provides that net loss of ecological functions is prohibited. But it ignores the language immediately following that sub-section, which specifically references various mitigation measures which may be employed to achieve no net loss:

(c) Proponents of new shoreline use and development shall employ measures to mitigate adverse impacts on shoreline functions and processes.

(d) Mitigation shall include the following actions in order of priority:

(i) avoiding the impact altogether by not taking a certain action or parts of an action;

(ii) minimizing impacts by limiting the degree of magnitude of the action and its implementation by using appropriate technology or by taking affirmative steps to avoid or reduce impacts;

(iii) rectifying the impact by repairing, rehabilitating, or restoring the affected environment;

(iv) reducing or eliminating the impact over time by preservation and maintenance operations;

(v) compensating for impact by replacing, enhancing, or providing substitute resources or environments;

(vi) monitoring the impact and the compensation projects and taking appropriate protective measures.

JCC 18.25.270(c) and (d).

Thus, the suggestion by PLF that no impacts of any kind are allowed is patently incorrect. If the SMP did not contemplate impacts, there would of course be no need for the various methods of mitigation outlined above. Ironically, PLF goes on to quote on the next page from the SMA and note that the Legislature "readily acknowledged that there will be alterations to the natural environment, which can be avoided, minimized or mitigated through appropriate planning. RCW 90.58.020."

(Amicus Brief, p. 11). That is precisely what the Jefferson County SMP does when it provides the various mitigation measures which are available to landowners when a development will cause ecological impacts. JCC 18.25.270(c) and (d).

PLF argues that shoreline regulations should not "prohibit appropriate development." But the SMP does not prohibit "appropriate development." Instead, the SMP designates shoreline zones where such appropriate development may occur and carefully explains through Use Tables the permissive uses in each zone. (SMP Article 4.2.c). The SMP also provides for conditional use permits and variances to allow property owners to avoid strict application of regulations, where appropriate. (SMP Article 9, p. 9-8).

PLF's primary objection to the Growth Board's decision is language to the effect that the primary goal of the SMA is protection of the shoreline environment. But such language is embodied in the SMA itself, at RCW 90.58.020. PLF acknowledges – as it must – that decisions from this Court have confirmed that shoreline protection is the primary goal of the SMA. *See, e.g., Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334 (2009); *Lund v. Department of Ecology*, 93 Wn. App. 329, 336-37, 969 P.2d 1072 (1998). PLF attempts to argue that these Court of Appeals decisions should be ignored as inconsistent with the Supreme Court's interpretation of the SMA. But in making this argument,

PLF ignores the language of the Supreme Court in *Buechel v. Ecology*, 125 Wn.2d 196, 203, 884 P.2d 910 (1994) that the SMA must be "broadly construed in order to protect the state shorelines as fully as possible."

The fact that the primary goal of the SMA is protection of the state's shorelines does not mean that property rights need be ignored. As explained in the Brief of Respondent Jefferson County, the SMP does indeed recognize private property rights, and provides numerous mechanisms by which landowners can develop their property and, where appropriate, avoid strict application of shoreline regulations, through conditional use permits, exemptions, variances, mitigation, etc. (SMP, Article 9).

The Growth Board's approval of the Jefferson County SMP was not clearly erroneous or unlawful. PLF's broad arguments opposing shoreline regulations do not warrant reversal of the Board's thorough and well-reasoned Final Decision and Order.

B. The SMP Provides an Adequate Baseline From Which to Determine No Net Loss.

In Section II of its amicus brief, PLF argues that the Board's interpretation of "no net loss" is "a concept so fundamentally defective that it can never achieve the Act's goal of balancing the environment and development." (Brief, p. 15). PLF's argument is based on its contention that the Jefferson County SMP does not provide an accurate "baseline" of

existing conditions. (Brief, p. 16). This argument ignores the hundreds of pages of detailed analysis of the existing conditions on Jefferson County's shorelines. Review of the SMP and its accompanying documents reveals that the Ecosystem Characterization and Ecosystem-Wide Processes (Section 3 in the Shoreline Inventory) consists of 40 pages of detailed analysis.

Additionally, the Reach Inventory and Analyses in the SI consist of approximately 120 pages of detailed description of shoreline reaches. (Section 4 in the SI). Furthermore, the Final Inventory and Characterization Map Folio (Appendix C to the SI), is detailed, informative and professionally prepared.

In analyzing the level of analysis underpinning the Jefferson County SMP, the Board concluded that the County's work met and exceeded the requirements of the SMA:

> Specifically, the Board found the County completed requirements in WAC 174-26-201(3) to "inventory shoreline conditions" and in WAC 173-26-201(3)(d) to "analyze shoreline issues of concern." The Board found the SI and the CIA to be comprehensive and informative in addressing these WAC requirements. In reviewing the County's SI and CIA, the Board finds the County completed the following steps which were also documented in Ordinance No. 07-1216-13:
>
> - Procured professional services from a qualified consulting firm and a science laboratory, established two citizen/stakeholder groups as technical and policy adversary committees, and compiled and reviewed "the most current, accurate

and complete scientific and technical information available" per WAC 173-26-201(2)(a).

- Hosted numerous public meetings to verify and assess the work of staff and advisory committees. In accordance with WAC 173-26-201(2)(a) and (3)(a-f), the County prepared an SI, a restoration plan, CIA to assess the collective effects of the SMP.
- Described limitations of the inventory including limitations to field verification, the scope of its inventory, and the limits of evaluating all shoreline policies and regulations.
- Assessed shorelines for impaired shoreline functions and the value of shorelines and created a tool by which policymakers could determine future uses.
- Inventoried each Water Resource Inventory Area (WRIA) to "build on the watershed overviews in Chapter 3 and describe conditions directly adjacent to individual shoreline segments (or reaches)." Specifically, in accordance with WAC 173-26-201(3)(c), Chapter 4 analyzes existing physical characteristics of every "reach" including land use patterns, transportation, utilities, impervious surfaces, vegetation, critical areas, degraded areas, channel migration zones, and archeological resources.
- Analyzed its shorelines, reach by reach, to understand ecological systems. Section 3.3.2 described causes and examples of changes to its shorelines, such as nutrient loading, landslides, climate change and their effects on shorelines.
- Reviewed conditions and regulations in shorelands and adjacent areas that affect shorelines, such as surface water management and land use regulations.
- Recommended environmental designations for uses along the shorelines.

See FDO, pp. 21-23.

In view of the extensive analysis performed by Jefferson County and Ecology, as enumerated above, it appears that PLF submitted its amicus brief in this appeal without carefully reviewing the extensive administrative record. A thorough review would have disclosed the extensive analysis and characterization of Jefferson County's shorelines that accompany the SMP.

C. The SMP Does Not Violate Constitutional Principles.

As its final argument, PLF argues that the Growth Board's approval of the SMP must be reversed based on violations of constitutional principles of "nexus" and "rough proportionality." As noted above, these arguments are similar to the claims raised by PLF and its client OSF in its challenge to the Jefferson County Critical Areas Ordinance.[1]

As in *OSF v. WWGMHB*, *supra*, PLF argues that the SMP's marine shoreline buffers constitute a violation of the Takings Clause, citing *Nollan* and *Dolan*, *supra*. But those cases are distinguishable on multiple grounds. First, *Nollan* and *Dolan* arose in the context of site specific permit restrictions. The appeals were in the nature of "as applied" challenges by the permit applicant. In contrast, any constitutional challenge in this appeal would be a "facial challenge," where the appellant

must show that there are no circumstances under which the SMP could be constitutional. *Guimont v. Clarke*, 121 Wn.2d 586, 606, 854 P.2d 1 (1993).

Furthermore, the cases relied upon by PLF involve true "exactions," i.e., compulsory donations of property, where the local government was requiring the property owner to dedicate a public greenway across applicant's property. *See*, *Dolan*, *supra*, 512 U.S. at 387, 393. Significantly, the Supreme Court stressed that a mere prohibition on development within a critical area would "obviously" satisfy the nexus and rough proportionality requirements. 512 U.S. at 387.

The Washington courts have held that ordinances restricting development in or near a critical area satisfy constitutional requirements of nexus and rough proportionality if the restrictions are based on science and were arrived at through a reasonable process. *Kitsap Alliance v. Hearings Board*, 160 Wn. App. 250, 273-74, 255 P.3d 696 (2011). As the Growth Board found, Jefferson County conducted a thorough takings analysis to ensure that the SMP can be implemented consistent with relevant constitutional limits on private property. (CP 7535-37); WAC 173-26-186(5), (8)(b)(i). For example, the SMP has no fewer than six ways to reduce a shoreline buffer, and four of these can be achieved

[1] In *OSF v. WWGMHB*, *supra*, the "nexus" and "rough proportionality" arguments were tied to a challenge to the CAO based on alleged violation of RCW

without a shoreline variance permit. (CP 143-48). Contrary to PLF's assertion that the buffers are "one-size-fits-all," the mechanisms for adjusting SMP buffers take into account the site-specific attributes of a property, the proposed development, and the need for protection at the site.

In view of the extensive scientific support for shoreline buffers to protect ecological resources, and provisions for flexible application, there is nothing to warrant a facial constitutional challenge to the SMP.

III. CONCLUSION

PLF's philosophical opposition to shoreline regulations such as Jefferson County's SMP does not justify a finding that the Growth Board's decision was clearly erroneous or unlawful. This Court should affirm the Board's approval of the SMP.

Respectfully submitted this 27 day of April, 2016.

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82.02.020.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was served on the parties of record as stated below in the manner indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated at Seattle, Washington on 27th April, 2016.

Nancy Randall